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PELITA RASA SDN BHD & ORS v. THEEBAN VENGADESH GOVINTARAU

HIGH COURT MALAYA, SHAH ALAM
LIM CHONG FONG JC
[CIVIL APPEAL NO: 12B-205-07-2014]
B 30 JANUARY 2015

DAMAGES: *Measure of damages – Assessment – Claimant climbed on lorry to cover tyres with canvas – Lorry driver moved lorry without prior warning to claimant – Claimant fell on forklift and suffered serious injuries – Claimant became paralysed* C *waist down and wheelchair bound – Claim for compensation – Whether first defendant personally liable in negligence – Whether claimant at all times an employee of third defendant – Appeal against liability and quantum of damages awarded by Sessions Court – Whether liability correctly apportioned – Whether damages awarded fair and reasonable*

D

The first defendant and the respondent ('the plaintiff') were directed by the second appellant ('the third defendant') to collect tyres from a customer. While at the premises, the plaintiff climbed up the lorry to cover the tyres with canvas after they were loaded on to the lorry. Without prior warning to the plaintiff, the first defendant moved the lorry, causing the plaintiff to E fall on to an adjacent forklift. The plaintiff suffered serious injuries, became paralysed waist down and is now permanently wheelchair bound. In seeking compensation from all the defendants, the plaintiff submitted that (i) the first defendant was personally liable in negligence; (ii) he was at all material times employed by the third defendant; and (iii) the rest of the defendants were F vicariously liable as the principal or the employer. On the contrary, the second to sixth defendants argued that the plaintiff and the first defendant were employed by the second defendant and as such, the third to sixth defendants were not involved whatsoever. The second and/or third defendants relied on s. 31 of the Employees Social Security Act 1969 G ('the Act') and submitted that the plaintiff's claim was, in any case, unsustainable. The Sessions Court Judge ('SCJ') entered judgment in default against the first defendant and found the rest of the defendants liable. The SCJ further found and held that the plaintiff and the first defendant were employed by the third defendant. The SCJ found the second to sixth defendants liable and awarded the plaintiff: (i) general damages of H RM143,000; (ii) special damages of RM4,124; (iii) special damages of RM2,000 for wheelchair; (iv) loss of earnings of RM1,000 per month; costs of future use of pampers and urine bags of RM24,600; and costs of future care of RM32,000. Dissatisfied, the defendants appealed against the liability and quantum of damages awarded by the SCJ while the plaintiff cross-appealed I on the quantum of damages.

Held (allowing appeal of second to fifth appellants; dismissing cross appeal by plaintiff)

(1) The SCJ fell into grave error when she found the plaintiff to be the employee of the third defendant and not the second defendant. It was clear that from the JPJ registration card, the lorry was owned by the second defendant. Furthermore, the adduced Forms 8A submitted to SOCSO in October 2010 clearly showed that the contribution of the plaintiff and the first defendant was made by the second defendant. Accordingly, there was no basis for finding liability against the third defendant. (paras 16 & 18)

(2) Even if the second or third defendant is liable, there was no justification in the SCJ's finding of all directors, namely the fourth to sixth defendants, to be personally liable. The SCJ had effectively lifted the corporate veil without any basis or justification. Corporate veil is rarely lifted save in exceptional situations such as actual fraud or conduct amounting to fraud in equity. None of such exceptional situations was applicable in this case. Hence, the unreasoned finding of liability on the part of the fourth to sixth defendants was bad and must accordingly be reversed. (para 22)

(3) The premises where the accident occurred is a road within the intents of the Road Transport Act 1987 and hence covered by the third party insurance required. Accordingly, the proviso to s. 31 of the Act was attracted and the second defendant was liable to the plaintiff. (para 32)

(4) The plaintiff's last salary was RM1,400. The SCJ had only awarded the multiplicand of RM1,000 and had already accounted for the plaintiff's personal expenses. The defendant argued that there was no evidence led on the need to employ a maid to care for the plaintiff. However, based on the nature of the injury sustained alone, the plaintiff would require the employment of a maid. (paras 33 & 34)

(5) The sum of RM250,000 as sought by the plaintiff was fair and reasonable. The award in respect for (i) bladder and bowel dysfunction in the sum of RM60,000; and (ii) surgical scar on the plaintiff's back in the sum of RM3,000 were fair and reasonable. There appeared to be no justification for the SCJ to reduce the medical costs incurred to just a third. Thus, the full undisputed medical costs of RM12,500 should be awarded. (paras 40, 41, 42 & 43)

(6) The plaintiff did not lead cogent evidence to justify the frequency of replacement of wheelchair. Likewise, in respect of the other heads of claim of special damages, the plaintiff's complaint appeared to be the multiplier, which is, the years to be applied. Since the plaintiff did not adduce cogent evidence and submission with relevant case authorities to support and justify this claim, the court was hesitant to disturb the finding and award of the SCJ (paras 44 & 45)

Case(s) referred to:

Alcatel-Lucent (Malaysia) Sdn Bhd v. Solid Investments Ltd & Another Appeal [2013] 2 CLJ 734 CA ***(refd)***

Commercial Union Assurance (M) Sdn Bhd v. Ng Chek Hung & Another Appeal [1997] 3 CLJ 189 CA ***(refd)***

Jasi Alam v. Nohya Bin Mustar & Anor [1974] 1 LNS 56 HC ***(refd)***

Jayabalan a/l Muniandy v. Lim Lay Bee [2011] 2 PIR [72] ***(refd)***

Kamaludin b Ab Hamid v. Mohd Haiuram b Hassan & Anor [2008] 2 PIR [37] ***(refd)***

Lee Kah Leong v. Yi Yang Trading Co [2007] 1 PIR [73] ***(refd)***

Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***

Liang Jee Keng v. Yik Kee Restaurant Sdn Bhd [2002] 2 CLJ 750 HC ***(refd)***

Lim Peng Khoon & 3 Ors v. Azizul Azreen b Abdul Rahim & Anor (and Another Suit) [2012] 1 PIR [20] ***(refd)***

Mohamad Khairudin Zakaria lwn. Pengarah Hospital Kuala Lumpur & Yang Lain [2013] 1 LNS 402 HC ***(refd)***

Mohammad Jamil Bin Mat Desa v. Wong Shi Zang & Anor [2014] 1 PIR [34] ***(refd)***

Othman Bin Taib v. Public Prosecutor [1972] 1 LNS 104 HC ***(refd)***

Pua Lai Ong v. Kassim Bin Yunus & Anor [1993] 3 CLJ 656 HC ***(refd)***

Ramli Samad v. Pacific & Orient Insurance Co Sdn Bhd [2010] 1 CLJ 970 CA ***(refd)***

Samad B Hamzah & Anor v. Murugan a/l Subramaniam [2011] 2 PIR [48] ***(refd)***

Tahan Insurance Malaysia Bhd v. Ong Choo Tian & Anor [2004] 7 CLJ 270 HC ***(refd)***

United Plywood and Sawmill Ltd v. Lock Ngan Loi [1970] 1 LNS 164 FC ***(refd)***

Zulsafari Ab Ghani & Anor v. Shahril Idris [2002] 3 CLJ 187 HC ***(refd)***

Legislation referred to:

Employees' Social Security Act 1969, s. 31

Road Transport Act 1987, s. 2

For the appellants - Adrian Thambyrajah; M/s Jayadeep Hari & Jamil

For the respondent - Mohd Aimi Zaini Mohd Azhar (Zainuritha-Alfa Abu Hassan with him); M/s Aimi Zainuritha & Co

[Appeal from Session Court; Civil Suit No: 53-440-05-2012]

Reported by Najib Tamby

JUDGMENT

Lim Chong Fong JC:

Introduction

[1] This is the appeal by the appellants who were the second to fifth defendants in the Sessions Court suit against the findings of liability and quantum of damages awarded by the Sessions Court Judge to the respondent who was the plaintiff. Judgment in default was earlier obtained against the first defendant and there was no appeal thereto.

[2] Besides, the plaintiff also cross appealed on the quantum of damages awarded by the Sessions Court Judge.

[3] The plaintiff suffered serious personal injury as the result of a work accident whilst attending to goods loaded onto a laden lorry bearing Registration No JKS 4976 ("lorry"). The first defendant is the driver of the lorry. The second defendant is the registered owner of the lorry. The third defendant and the second defendant are related companies. The fourth to sixth defendants are company directors of the third defendant.

[4] After trial, the learned Sessions Court Judge on 17 June 2014 found all the second to sixth defendants 100% liable and ordered payment of special and general damages to the plaintiff together with interests and costs as detailed in the judgment.

[5] I heard the appeal on 21 November 2014 and 9 January 2015. There was further clarification with counsel on 16 January 2015.

Salient Facts

[6] On 23 September 2010, the first defendant and the plaintiff were directed by the third defendant to collect tyres from the premises of YHI (M) Sdn Bhd, a customer of the third defendant at 15 Jalan U1/23, Hicom Glenmarie Industrial, 40150 Shah Alam, Selangor ("premises"). The tyres were to be transported by the lorry driven by the first defendant and attended to by the plaintiff.

[7] Whilst at the premises at around 5pm on 24 September 2010, the plaintiff climbed up the lorry to cover the tyres with canvas after they were loaded onto the lorry. At that instance, the first defendant moved the lorry without prior warning the plaintiff and in consequence the plaintiff fell onto an adjacent forklift.

[8] The plaintiff suffered serious injuries and became paralysed waist down. He underwent hospitalisation and is now permanently wheelchair bound.

[9] Accordingly the plaintiff sought compensation from all the defendants including for long term nursing care and loss of earnings besides pain and suffering.

[10] The plaintiff has made a claim on SOCSO under the Employee's Social Security Act 1969 and was paid accordingly.

Contentions Of The Plaintiff (Respondent)

[11] In gist, the plaintiff submitted that the first defendant is personally liable in negligence and the rest of the defendants are vicariously liable as the principal or the employer of the first defendant. The plaintiff also submitted that the plaintiff was at all material times employed by the third defendant.

A **Contentions Of The Second To Sixth Defendants (First To Fifth Appellants)**

[12] The second to sixth defendants put the plaintiff to strict proof and submitted that both the plaintiff and the first defendant were instead employed by the second defendant. As such, the third to sixth defendants
B were not involved whatsoever.

[13] That notwithstanding, the second and/or third defendants rely on s. 31 of the Employees Social Security Act 1969 and submitted that the plaintiff's claim is in any case unsustainable.

C **Findings Of The Court**

Liability

[14] Apart from the first defendant where judgment in default was entered against him, the learned Sessions Court Judge found the rest of the defendants
D liable too. She nonetheless found the first defendant negligent as that was not seriously challenged by the rest of the defendants.

Moreover, she found and held that both the plaintiff and the first defendant was employed by the third defendant. In this regard, it is seen from her grounds of judgment dated 7 August 2014 that she relied on her observation
E of the defendants' witnesses' testimony in court as well as the police report of the fifth defendant dated 18 January 2012 that the third defendant is the owner of the lorry. She also found that the business transactions that took place including the tyre collection on the day of the accident were those of the third defendant.

F **[15]** The learned judge did not however proffer any reason in her grounds of judgment for finding the rest of the defendants liable especially the fourth to sixth defendants as to why she saw it fit to lift the corporate veil of the third defendant.

G **[16]** I find that the learned judge has wrongly evaluated the weight of the evidence adduced. She appears to be swayed by the witnesses' testimony and her inferences therefrom but discarded cogent hard documentary evidence that plainly tell otherwise. In this respect, it is clear to me from the JPJ registration card that the lorry is owned by the second defendant. In addition, the adduced forms 8A submitted to SOCSO in October 2010 clearly show
H that the contribution of the plaintiff and first defendant was made by the second defendant. Also it is undisputed that the plaintiff was compensated by SOCSO as the result thereof.

[17] It is settled law that the appellate court would be slow to interfere with the findings of the trial court on liability unless the factual findings are
I perverse or plainly wrong: see *Commercial Union Assurance (M) Sdn Bhd v. Ng Chek Hung & Another Appeal* [1997] 3 CLJ 189; [1997] 2 MLJ 465.

[18] Furthermore, Gopal Sri Ram JCA (as he then was) in *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19, said:

> Suffice to say that we re-affirm the proposition that an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence. It is, we think appropriate that we say what judicial appreciation of evidence involves.
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> A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or reject the evidence test it against the relevant criteria. *Thus, he must take into account the presence or absence of any motive that a witness may have in giving evidence. If there are contemporary documents, the he must test the oral evidence against these. He must also test the evidence of a particular witness against the probabilities of the case*. A trier of fact who makes findings based purely upon the demeanour of witnesses without undertaking a critical analysis of that witness evidence runs the risk of having his findings corrected on appeal … (emphasis added)

[19] In the premises, it is my view that the learned Sessions Court Judge fell into grave error when she found the plaintiff to be the employee of the third defendant and not the second defendant. This finding of the learned judge is glaringly in contradiction with the cogent documentary evidence adduced; to wit the vehicle registration card and vehicle permit of the lorry as well as the EPF and SOCSO contribution forms of October 2010 submitted by the second defendant which plainly showed contribution of the plaintiff. More pertinently, the plaintiff himself claimed and successfully recovered from SOCSO based on the aforesaid submission form. Though I am mindful that the learned judge justified her findings on the testimony of the witnesses and police report of the fifth defendant, she has to my mind not undertaken the critical analysis of all the evidence adduced as a whole. I am convinced based on the totality of the evidence before the court that the plaintiff was unmistakably employed by the second defendant.

Likewise the EPF contribution form submitted by the second defendant in October 2010 also showed contribution of the first defendant as employee.

[20] In the circumstances, I find that appellate intervention is necessary and justified here to reverse the learned judge's finding that the third defendant was the employer of both the plaintiff and the first defendant. They ought to be corrected as employees of the second defendant.

[21] Accordingly, there is no basis whatsoever for finding liability against the third defendant. Even if the first defendant is liable, the vicarious liability of his employer rests with the second defendant.

[22] Even if the second or third defendant is liable, I see no justification in the learned judge's finding of all the directors, to wit the fourth to sixth defendants liable personally. She has effectively lifted the corporate veil without any basis or justification. In the recent Court of Appeal case of *Alcatel-Lucent (Malaysia) Sdn Bhd v. Solid Investments Ltd & Another Appeal* [2013] 2 CLJ 734, it is seen that the corporate veil is rarely lifted save in exceptional situations such as actual fraud or conduct amounting to fraud in equity. None of such exceptional situations are applicable here. Clearly, the unreasoned finding of liability on the part of the fourth to sixth defendants is bad and must accordingly be reversed.

[23] As for the second defendant, it should be vicariously liable for the tort of the first defendant unless exempted by s. 31 of the Employees Social Security Act 1969 which reads:

> 31. Liability of the employer and his servant
>
> An insured person or his dependants shall not be entitled to receive or recover from the employer of the insured person, or from any other person who is the servant of the employer, any compensation or damages under any other law for the time being in force in respect of an employment injury sustained as an employee under this Act:
>
> Provided that the prohibition in this section shall not apply to any claim arising from motor vehicle accidents where the employer or the servant of the employer is required to be insured against Third Party Risks under Part IV of the Road Transport Act 1987 [Act 333].

[24] The effect of this section of the statute has been clearly discussed in the Court of Appeal case of *Ramli Samad v. Pacific & Orient Insurance Co Sdn Bhd* [2010] 1 CLJ 970 where Abdul Malik Ishak JCA opined at p. 985:

> [32] *What it amounts to is this. That by virtue of the original version of s. 31 of the SOCSO Act, the plaintiff appellant is barred from suing the second defendant who was the employer of the plaintiff appellant*. The plaintiff appellant's solicitors had no choice but to withdraw the plaintiff appellant's action against the second defendant employer. This was done on 11 October 1991.
>
> [33] It must be borne in mind that the writ action was filed in the Sessions Court at Kuala Lumpur on 14 September 1988 and it was also dated on the same day. Interestingly, the plaintiff appellant's statement of claim contained the following salient averments as seen at p. 30 of the appeal record. I shall now reproduce them verbatim:
>
> 3. The 2nd defendant was at all material times to this action, the owner of motor lorry No: WBE 3310.
>
> 4. The 1st defendant was at all material times to this action, the servant or agent of the 2nd defendant.
>
> 6. The said accident was caused by the negligence of the 1st defendant, a servant or agent of the 2nd defendant. (emphasis added)

It is also seen in *Liang Jee Keng v. Yik Kee Restaurant Sdn Bhd* [2002] 2 CLJ 750 that this section of the statute is attracted notwithstanding that the employee was not registered with the SOCSO office at the time of the accident and there was no contribution paid under the statute.

[25] Nevertheless, the plaintiff herein contended that the proviso to the section applied herein in that the claim arose from a motor vehicle accident where the employer is insured for third party risks pursuant to Part IV of the Road Transport Act 1987.

[26] I am satisfied that the second defendant is obliged to procure third party insurance for the lorry for purposes of the Road Transport Act 1987. However I noted that the accident occurred in the premises of YHI (M) Sdn Bhd, a customer of the third defendant and in that regard whether the premises is within the definition of road as envisaged by the Road Transport Act 1987.

[27] From the evidence adduced at trial, the public particularly the customers have free "in and out" motor vehicle access from the premises to load and unload goods.

[28] Road is defined in s. 2 of the Road Transport Act 1987 as follows:

> 2. Interpretation
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> "road" means:
>
> (a) any public road and any other road to which the public has access and includes bridges, tunnels, lay-bys, ferry facilities, interchanges, round-abouts, traffic islands, road dividers, all traffic lanes, acceleration lanes, deceleration lanes, side-tables, median strips, overpasses, underpasses, approaches, entrance and exit ramps, toll plazas, service areas, and other structures and fixtures to fully effect its use;
>
> (b) for the purposes of sections 70 and 85, also includes a road under construction; and
>
> (c) for the purpose of sections 41, 42, 43, 44, 45 and 45A, also includes a parking place.

[29] That notwithstanding, I note that in *Othman Taib v. PP* [1972] 1 LNS 104; [1972] 1 MLJ 261, Ong Hock Sim FJ held as follows:

> **Whether it is such a road is a question of fact**. As is said by Lord Parker C.J. in *Griffin v. Squires* [1958] 3 All ER 468 470 at page 470:
>
> > It is eminently a question of fact for the justices to say whether a certain space is a road. Having decided that the general public have access to it, they must then go further and ask: Is this place to which the public have access a road?
>
> **It has been held therefore that a road leading from a public highway to a farm house is a "road" if the public have access thereto**. As Lord Sands said in *Harrison v. Hill*, *supra*, at page 17:

> Any road may be regarded as a road to which the public have access if it is a road upon which members of the public are to be found who have not obtained access either by overcoming a physical obstruction or in defiance of a prohibition express or implied.

(See also *Chapman v. Parlby* (1964) 62 LGR 150).

A Singapore case decided on appeal in 1941 (Rex v. LW Burgess [1941] MLJ 123) ruled that a road, the property of the Air Ministry, along which were native shops open to the public except for one day in the year for preserving its private nature was a public thoroughfare. As McElwaine CJ said:

> ... the agreed facts strongly suggest that on all except one day in the year it is indicated to the public that they may use the road and that on those 364 days the public is granted access to the road and it is on those days a public thoroughfare.

So was it decided in Harrison v. Co-operative Insurance Co Ltd (1968) 118 NLJ 910 that a factory road will be such a road if the "Private Road" sign has been removed and not replaced and there is no other indication that access by the public is restricted.

He said further that lots of cars, pedestrians, cyclists and buses were allowed freely to enter the school. He himself was not stopped. The defence called the business manager of the school who said the road in question was a private road but school children, staff and any other person having business with the school have implied permission to enter. Trespassers and people acting suspiciously would be told to leave. In my view, upon the evidence before him the learned magistrate was fully justified in concluding that it was a road as defined. (emphasis added)

[30] Also in *Tahan Insurance Malaysia Bhd v. Ong Choo Tian & Anor* [2004] 7 CLJ 270; [2004] 6 MLJ 367, Kamalanathan Ratnam J held that a five-foot path or way is a public thoroughfare and he found the insurance company liable for a collision that took place within the compound of the house where the public had access.

[31] It seems to me that the interpretation of road must be given a broad contextual meaning. The principal and dominant requirement is that of public access. Thus it can and will in my view encompass areas that are connected and accessible to those features comprising of road listed in s. 2 of the Road Transport Act 1987.

[32] On the facts of this case, I therefore find and hold that the premises wherein the accident occurred is a road within the intents of the Road Transport Act 1987 and hence covered by the third party insurance required thereunder. Accordingly, the proviso to s. 31 of the Employees Social Security Act 1969 is attracted and the second defendant is liable to the plaintiff.

Quantum Of Damages

[33] The defendants have also submitted that the quantum awarded by the learned Sessions Court Judge for loss of earnings and costs of care are excessive. As for the former, the defendants argued that there was no deduction for the plaintiff's expenses of RM25/day and in respect of the latter there was no evidence led on the need to employ a maid to care for the plaintiff.

[34] From the evidence adduced, the plaintiff's last salary was RM1,400. Since the learned judge has only awarded the multiplicand of RM1,000 for the loss of earning claim, I am satisfied that she has already accounted for the personal expenses of the plaintiff. With regard to the employment of the maid, I am convinced that the plaintiff will require one based on the nature of this injury sustained alone particularly in the medium term. Hence it is unnecessary in my view to produce evidence of employment of the maid.

[35] The plaintiff on the other hand submitted that the award of the learned judge was inadequate in respect of several heads of claim, to wit:

(i) general damages of RM143,000 comprising of RM80,000 for vertebrae fracture with neurological deficit and post surgery infection complication that resulted in paralysis of the plaintiff's lower limbs, RM60,000 for bladder and bowel dysfunction and RM3,000 for surgical scars;

(ii) special damages of RM4,124 (1/3 of RM12,500) for medical treatment costs;

(iii) special damages of RM2,000 for wheelchair;

(iv) loss of earnings of RM1,000 per month;

(v) costs of future use of pampers and urine bags of RM24,600 (164 months x RM150); and

(vi) costs of future care of RM32,000 (40 months x RM800).

[36] I will deal with each head of claim *seriatim*.

[37] The litmus test as to whether appellate intervention on quantum of damages awarded is warranted is the "good gracious test" as explained by Gill FJ in *United Plywood and Sawmill Ltd v. Lock Ngan Loi* [1970] 1 LNS 164; [1970] 2 MLJ 237 at p. 238 as follows with emphasis added:

> As has been said again and again, the assessment of damages in cases of personal injury is one of the most difficult things for either a judge in the first instance or a Court of Appeal. When a man has lost his arm there is no sum in the world that can in the true sense compensate for it. Yet compensation in the form of money is the only way in which he can be granted redress for the injury he has suffered. It is neither possible nor desirable for damages for the loss of an arm to be standardised or rigidly

A classified, as no two cases are ever alike. But in order to maintain some semblance of uniformity, the amounts awarded in past cases, which bear reasonable comparison with the case under review, should serve as a useful guide. *The general principle is that an appellate court can only interfere with an assessment if it is considered so inordinately low or inordinately high as to make the court exclaim, "Good gracious, is that the sum which has been awarded - that* B *sum must be altered", or if it is so much out of line with the discernible trend or pattern of awards in reasonably comparable cases that it must be regarded as a wholly erroneous estimate*.
(emphasis added)

This test is settled and has been applied in a string of latter appellate court C cases thereafter.

[38] As for the head of claim of general damages for vertebrae fracture, there was a burst fracture at the plaintiff's L1 vertebrae with neurological deficit. In lay terms, he suffered traumatic spinal cord injury and that resulted in permanent paralysis of his lower limbs. The plaintiff principally relied on D the case of *Mohamad Khairudin Zakaria lwn. Pengarah Hospital Kuala Lumpur & Yang Lain* [2013] 1 LNS 402; [2013] 2 PIR 14 where RM250,000 was awarded on similar injury that resulted in paralysis. In that case, the court arrived at that amount after reviewing the awards in the earlier like cases of *Pua Lai Ong v. Kassim Bin Yunus & Anor* [1993] 3 CLJ 656; [1993] 2 AMR E 3208 of RM180,000 and *Zulsafari Ab Ghani & Anor v. Shahril Idris* [2002] 3 CLJ 187 of RM198,000. The court felt that RM250,000 was a reasonable sum in 2013. The defendants however responded that in *Lim Peng Khoon & 3 Ors v. Azizul Azreen b Abdul Rahim & Anor (and Another Suit)* [2012] 1 PIR [20] awarded only RM40,000.

F **[39]** The learned judge adopted a sum in between and awarded RM80,000. I have carefully examined the cases and compared the nature of the injury sustained and the resultant effect on the victim. I find that the facts in *Lim Peng Khoon*'s case can be differentiated in that the plaintiff therein only suffered paraparesis, to wit partial paralysis that resulted in backache and G weakness of the right lower limb.

[40] In the premises, I am of the view that the sum of RM250,000 as sought by the plaintiff herein is fair and reasonable.

[41] In respect of the claim for bladder and bowel dysfunction, I am H satisfied that the learned judge's award of RM60,000 is fair and reasonable instead of RM100,000 as claimed since the earlier awards in *Lee Kah Leong v. Yi Yang Trading Co* [2007] 1 PIR [73], *Jayabalan a/l Muniandy v. Lim Lay Bee* [2011] 2 PIR [72] and *Samad B Hamzah & Anor v. Murugan a/l Subramaniam* [2011] 2 PIR [48] were in the range of RM20,000 to RM40,000.

I **[42]** As for surgical scar on the plaintiff's back wherein RM10,000 was claimed, the award of RM3,000 is also in my view still fair and reasonable notwithstanding that RM5,000 was awarded in *Mohammad Jamil Bin Mat*

Desa v. Wong Shi Zang & Anor [2014] 1 PIR [34]. In fact RM3,000 was awarded in *Kamaludin b Ab Hamid v. Mohd Haiuram b Hassan & Anor* [2008] 2 PIR [37].

[43] In respect of the special damages, the plaintiff firstly complained on the unfounded reduction of the medical costs incurred to just a third. There appears to be no justification for the learned judge to do so. Thus it is my view that the full undisputed medical costs of RM12,500 ought instead to be awarded and I vary it accordingly.

[44] Next, as for the head of claim of special damages for wheelchair, the gist of the plaintiff's complaint is that the learned judge failed to take into account the yearly need of replacement a new wheelchair. The burden of proof is upon the plaintiff; See *Jasi Alam v. Nohya Mustar & Anor* [1974] 1 LNS 56. However and since the plaintiff did not lead cogent evidence to justify the frequency of change as needed, I do not see it fit to vary the learned judge's award.

[45] Likewise in respect of the other heads of claim of special damages, the plaintiff's complaint appears to be the multiplier, that is to say, the years to be applied. Since the plaintiff did not adduce cogent evidence and submission with the relevant case authorities to support and justify this claim, I am again hesitant to disturb the findings and award of the learned judge.

Conclusion

[46] For the foregoing reasons, I allow the appeal of the second to fifth appellants. The appeal by the first appellant is dismissed.

[47] As to the cross-appeal, I vary the award of the sessions court in respect of the first appellant only for general damages for L1 vertebrae burst fracture with neurological deficit and post surgery infection complication to RM250,000 and special damages for medical costs to RM12,500. The cross-appeal against the second to fifth respondents is dismissed.

[48] Each party shall bear its own costs.